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NO. 92-908

IN THE
SUPREME COURT OF THE UNITED STATES
NOVEMBER TERM, 1992

MIKE CAPLINGER
and
EDDY LANKFORD,
Petitioners,

v.

JANE DOE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sexual molestation of a schoolchild by a public school teacher violates the due process and equal protection clauses of the Fourteenth Amendment.

2. Whether a public school superintendent and principal are liable under 42 U.S.C. 1983 where they acted with deliberate indifference to a schoolchild's constitutional right not to be sexually molested.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1-A-25) is reported at 975 F.2d 137. The decision of the district court (Pet. App. C-1-C-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1992. The petition for a writ of certiorari was filed on November 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Jane Doe brought this suit in the United States District Court for the Western District of Texas against Taylor Independent School District, her ninth-grade biology teacher Lynn Stroud, and petitioners, school superintendent Mike Caplinger and principal Eddy Lankford, alleging violations of, *inter alia,* 42 U.S.C. 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681. With respect to her Section 1983 claims, respondent alleged that Defendant Stroud had repeatedly sexually abused and harassed her in violation of rights guaranteed to her by the due process and equal protection clauses of the Fourteenth Amendment. She further alleged that Petitioners Lankford and Caplinger had actual or constructive knowledge of Stroud's misconduct and were deliberately indifferent to the violation of her rights.[1]

As early as 1985, Petitioner Lankford and subsequently Petitioner Caplinger received complaints that Lynn Stroud, a teacher and coach at Taylor High School, engaged in sexually-oriented favoritism and inappropriate conduct of a sexual nature with female students. Pet. App. A-3, C-3-C-5. In the fall of 1986, Stroud became respondent's ninth-grade biology teacher and "began his seduction of her by writing suggestive comments on test papers" and kissing her on the cheek as she was leaving the school field house. Pet. App. A-3. "Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house where he would kiss and touch her. " *Ibid.* He also called her out of other teacher's classrooms to engage in this behavior in the lab room. Pet. App. C-7-C-8.

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[1] The portion of the complaint quoted by petitioners (Pet. 5) omits paragraph 36 in which respondent alleged that petitioners "acted with deliberate and conscious indifference to [her] constitutional rights." Record on appeal, vol. II, p. 584.

Around Valentine's Day 1987, Stroud gave respondent a valentine in class on which he wrote, "'To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever - for real - I love you.'" Pet. App. A-3, C-8. A classmate, who had found the valentine, took it to the principal, Petitioner Lankford, and indicated that she thought that respondent and Stroud were sexually involved. Pet. App. A-4, C-8-C-9. Petitioner Lankford said he was aware of rumors and "that Stroud just had a way of flirting with the girls." Pet. App. A-4. Lankford transferred the classmate out of Stroud's class and did not investigate further. Soon thereafter, the superintendent, Petitioner Caplinger, who had received previous complaints of sexual misconduct by Stroud, learned "that Stroud was behaving 'unprofessionally' with [respondent] at a school basketball game." *Ibid.*

Stroud eventually persuaded respondent to have sexual intercourse with him in March or April of 1987. Pet. App. A-4-A-5, C-11. "Over the course of the next several months, Stroud and [respondent] had repeated sexual contact at different locations, both on and off the school grounds." Pet. App. A-5.[2]

In June 1987, two parents complained to Petitioner Caplinger that Stroud had behaved improperly with respondent and some other girls. They also complained "that Stroud exhibited favoritism toward female students in class." Pet. App. A-5. Petitioner Caplinger did not discuss the complaint with respondent's parents, and no one mentioned the incident to Stroud. Pet. App. A-5, C-12.

In July 1987, respondent's parents found among her possessions photographs of Stroud with handwritten notes on the backs similar to those on the valentine. Respondent's parents immediately met with Petitioner Caplinger, who confirmed that he was aware of rumors concerning Stroud. Pet. App. A-6, C-12-C-13. Petitioners met separately with

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[2] Petitioners state that Lankford spoke with Stroud in the spring of 1987 (Pet. 4), but Stroud stated in his deposition that he did not recall anyone speaking to him and that he would have remembered had it occurred. Stroud Dep. 486-87.

respondent and Stroud, each of whom denied that they were having a sexual relationship. Petitioner Lankford "warned Stroud that he would be fired 'if something was going on.'" Pet. App. A-6, C-13. Petitioners "were apparently satisfied that nothing was going on, based solely on the adamant denials of the alleged culprit (Stroud) and the 15 year-old victim . . . ." Pet. App. A-6.[3]

Although respondent and Stroud stayed apart for the remainder of the summer, he began walking her to classes after school started and they resumed having sexual intercourse. Pet. App. A-6, C-13. In October 1987, respondent's mother found more love letters from Stroud and consulted with their family lawyer, to whom respondent disclosed what had happened between her and Stroud. The attorney reported the abuse to Petitioner Caplinger, who on the same day received a complaint that Stroud had made unwelcome sexual advances toward another schoolgirl. Stroud was suspended and later pled guilty to criminal charges. Pet. App. A-7.

2. In a lengthy opinion, the district court denied petitioners' motion for summary judgment on their defense of qualified immunity. The district court held that the sexual molestation respondent suffered violated her clearly established constitutional right to be free from bodily harm and sexual harassment at school. Finding material factual issues in dispute, the district court held that while petitioners may not have had a duty to protect respondent, "they certainly had a duty to respond to the parents, teachers, students and fellow administrators' blatant protests against the offender's conduct." Pet. App. C-22. The district court concluded that the evidence raised a reasonable question of fact as to whether petitioners "tolerate[d] Stroud's abuse to the point that they actually condoned the abuse. . . ." *Ibid.*

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[3] Petitioners claim, without citation to the record, that Caplinger concluded that he did not have enough evidence to discharge Stroud, and they suggest that this was upon advice of counsel. Pet. 4. However, petitioners refused to reveal information about advice from counsel. Caplinger Dep. 139. Moreover, Caplinger stated at his deposition that he did not recommend Stroud's termination because he had not given Stroud a directive not to communicate with respondent. *Id.* at 191-92.

3. On interlocutory appeal the court of appeals affirmed the denial of summary judgment and remanded the case for trial. The court of appeals held that respondent "had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher." Pet. App. A-2. With respect to respondent's due process claim, the court of appeals reasoned "that bodily integrity is necessarily compromised when a state actor sexually assaults a schoolchild. . . and that such misconduct implicates due process." Pet. App. A-12. With respect to her equal protection claim, the court held that sexual harassment in the school setting is sex discrimination proscribed by the equal protection clause. Pet. App. A-24.

Turning to the issue of petitioners' liability, the court of appeals determined that school officials have both "a duty to police the misconduct of their subordinates and [a duty] to protect schoolchildren from hazards of which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them." Pet. App. A-21. The court of appeals cautioned that "[t]his does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." *Ibid.* Rather, school officials are liable only for invasions "of constitutional dimensions" and only when the elements of *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990), are met, including notice of and demonstrated deliberate indifference to a pattern of unconstitutional acts. Pet. App. A-22; *see also* Pet. App. A-14.

The court of appeals held that petitioners could be found liable based on the evidence of their deliberate indifference to a known pattern of misconduct by Stroud. Pet. App. A-22-A-23. The court concluded that summary judgment was inappropriate because "a jury could find that [petitioners] *non*feasance . . . was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that [petitioners'] toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his *mal*feasance." Pet. App. A-24. Finally, the court of appeals held that the same analysis requires sending

respondent's equal protection claim to the jury as well. Pet. App. A-24-A-25.

ARGUMENT

1. Every court of appeals that has reviewed a case of sexual molestation of a schoolchild by a teacher or other public employee has agreed with the court of appeals in this case that such abuse violates the child's Fourteenth Amendment rights. *See D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 213 (1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 726-27 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) *(Stoneking II)*.[4] Therefore, no conflict exists among the circuits warranting review by this Court on the issue presented to and decided by the court below, namely whether a public schoolchild possesses a constitutional right not to be sexually molested by her teacher. Moreover, the unanimous view of the courts of appeals is correct and in accord with the principle, recognized by this Court in *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), that the due process clause protects against unjustified state intrusion into the bodily integrity of schoolchildren.[5]

Indeed, petitioners "do not dispute that public school students arguably enjoy a constitutional right to be free from sexual molestation by a state-employed school teacher which

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[4] *See also Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642 (8th Cir. 1990)(implicitly assuming that sexual abuse of school children by a school employee would be unconstitutional).

District courts have likewise found sexual abuse by a public school employee to offend the due process guarantees of the Constitution. *Viavant v. Steiner*, 1992 WL 59387 (E.D. La.); *Robert G. v. Newburgh City School District*, 1990 WL 3210 (S.D.N.Y.).

[5] The court of appeals' decision also correctly recognizes that sexual harassment and sexual abuse constitute intentional sex discrimination, which is a violation of the equal protection clause of the Fourteenth Amendment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988). *See also Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028, 1037 (1992)(sexual harassment and abuse of a student is intentional discrimination based on sex).

occurs during the course of school attendance or school related activities." Pet. 9. Petitioners complain, however, that the court of appeals did not make distinctions concerning the place and time of the sexual abuse. Petitioners themselves failed to raise these distinctions in either of the courts below. Specifically, petitioners did not argue, as they do before this Court, that the constitutional right alleged by respondent should be applicable only to abuse which occurs in connection with school attendance, nor did petitioners argue that respondent's ninth-grade teacher Stroud was not acting under color of state law when he molested her. Petitioners did not even cite in their briefs to the court of appeals the case on which they now chiefly rely for their argument on this issue -- *D.T. by M.T. v. Independent School District No. 16, supra*. *See* Pet. 13-14. Having failed to raise below the issue of whether the right to be free from sexual abuse should be "qualified" according to the time and location of the abuse, petitioners are precluded from raising it for the first time in this Court. *See Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *Houghton v. Jones*, 68 U.S. 702, 705 (1863).

Furthermore, respondent was sexually harassed and abused during school hours, in connection with school activities and on school property. Among other things, Stroud showed sexual favoritism toward female students in class, wrote suggestive comments on respondent's test papers, and gave her a suggestive valentine in class. He kissed and touched respondent in a sexual manner in the lab room next to his classroom during class hours, sometimes taking her out of other classes to do so. Pet. App. A-3, C-7-C-8. Stroud acted inappropriately with respondent at a school basketball game and had sexual intercourse with her in the school fieldhouse, sometimes after school games. Pet. App. A-4-A-5, C-11, C-13-C-14. Thus, the distinction petitioners seek to make "between sexual molestation which occurs in connection with school attendance and that which does not" (Pet. 12) makes no difference to the outcome of

this case since respondent in fact suffered sexual abuse in connection with school attendance.[6]

Moreover, the analysis suggested by petitioners -- that respondent's due process and equal protection rights should be qualified or restricted -- is not supported by any of the case law cited by petitioners nor by any other authority to respondent's knowledge. Rather, the proper analytical framework is that utilized by the Tenth Circuit in *D.T. by M.T. v. Independent School District No. 16*.. There, the court, following established precedent, looked to see whether sexual abuse allegedly unconnected to a teacher's public employment was committed "under color of state law." 894 F.2d at 1186-1192.[7] The Fifth Circuit did not address this issue presumably because it was not raised by petitioners. Therefore, the decision below is not in conflict with *D.T. by M.T.*.

There is also no conflict because the facts of this case are radically different from those in *D.T. by M.T.*. The Tenth Circuit found an insufficient nexus to the school district because the abuse in that case occurred during the summer when the teacher had no contractual obligations to the district and he was on a private fund-raising trip unrelated to the school. 894 F.2d at 1182-83, 1187-88. In

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[6] If petitioners are suggesting that the abuse respondent suffered in connection with her school attendance did not rise to the level of a constitutional violation, petitioners are wrong. As the evidence summarized above shows, Stroud harassed, physically assaulted and molested respondent in a variety of places at school, including in the lab and the school fieldhouse. These invasions of her bodily integrity and incidents of sexual harassment clearly violated her rights to due process and equal protection of the law.

[7] The proper analysis in determining whether there has been a violation of 42 U.S.C. 1983 is to inquire "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1980), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986).

this case respondent was victimized by one of her public school teachers during the school year and at times even during class hours, thus creating the nexus to state action which was lacking in *D.T. by M.T.*. *See also Stoneking II*, 882 F.2d at 722, 726-27 (band director's sexual molestation of a student violated her clearly established constitutional rights although some of the acts of abuse occurred in his car or in his house).

In sum, review of the first question presented by petitioners, *viz* whether a student has an "unqualified" right to be free from sexual abuse by a teacher, is unwarranted because there is no conflict in the circuits on the issue, it was not raised below, it does not affect the outcome of the case, and petitioners' unique analytical approach is unsound and unworkable.

2. Petitioners also seek review of the Fifth Circuit's conclusion that they can be held liable for injuries to respondent caused by breach of their duty to protect her from known constitutional violations. The court of appeals held, in the alternative, that petitioners could also be held liable for breach of their duty "to police the misconduct of their subordinates . . . ." Pet. App. A-21. Petitioners do not challenge the latter holding. However, the standards outlined by the court of appeals for establishing liability based on a duty to protect are the same as the standards for finding supervisory liability, which petitioners accept as correct. The standards are also the same as those adopted by other courts of appeals that have reviewed the issue of a school official's liability for sexual abuse by a subordinate.

Specifically, the court of appeals held that school officials are liable for the constitutional wrongs done to schoolchildren, under either of its two alternative theories (breach of duty to protect or breach of duty to supervise), only upon proof of the four elements set forth in *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). Pet. App. A-21-A-22. Those four requirements are that 1) the school officials had "notice of a pattern of unconstitutional acts by subordinates," 2) they were deliberately indifferent to those offensive acts, 3) they "failed to take sufficient remedial action" and 4) their failure proximately caused the child's injuries. 901 F.2d at 645; *see also* Pet. App. A-14. The *Jane Doe "A"* "deliberate

indifference" standard adopted by the Eighth and Fifth Circuits is consistent with the standards recognized by other circuits for establishing school officials' Section 1983 liability. *See Stoneking II*, 882 F.2d at 725 (school officials may be held liable based on "policies maintained in deliberate indifference to actions taken by subordinates"); *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d at 1193 (court recognized that liability could be predicated on school officials' deliberate indifference to constitutional rights, but found insufficient evidence of deliberate indifference). *Cf. J.O. v. Alton Community School District 11*, 909 F.2d 267, 272-73 & n. 4 (7th Cir. 1990)(suggesting that the court would find liability where school officials promulgated policies that fostered child abuse).[8] The standard adopted by the court of appeals is also akin to the deliberate indifference standard for determining the liability under Section 183 of a municipality which allegedly failed to carry out its responsibilities to train its employees. *See City of Canton v. Harris*, 479 U.S. 378 (1989).

Petitioners complain that by casting the *Jane Doe "A"* elements "in the form of an affirmative duty," the opinion of the court below is in conflict with the opinions of other courts which have rejected the concept of a duty to protect children based on a special relationship evolving from compulsory attendance laws. Pet. 15. However, a reading

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[8] Courts of appeals have recognized the deliberate indifference standard for establishing a supervisor's liability under Section 1983 outside the school setting as well. *See, e.g., Greason v. Kemp*, 891 F.2d 829, 836-37 & n.15 (11th Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902-03 (1st Cir. 1988); *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988).

District courts have also applied the deliberate indifference standard in analyzing Section 1983 claims that school officials are responsible for the misconduct of subordinates. *See Viavant v. Steiner*, 1992 WL 59387 (E.D. La.); *Waechter v. School District No.14-030*, 773 F. Supp. 1005 (W.D. Mich. 1991); *Robert G. v. Newburgh City School District*, 1990 WL 3210 (S.D.N.Y.).

of the decision below shows that petitioners' complaint is about form and not substance. The court of appeals very narrowly circumscribed the duty it recognized. By requiring that the elements of *Jane Doe "A"* be satisfied, the court of appeals insured that school officials could be liable only for the constitutional invasion of children's rights by their subordinates, and not for the misconduct of private actors. As the court of appeals emphasized, its decision "does not mean that school officials are liable in the ordinary course for injuries to students inflicted by fellow students." Pet. App. A-21. The decision below is thus consistent with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989), in which this Court held that, absent a custodial relationship, the due process clause does not require the State to protect its citizens from harm by private actors.

Contrary to petitioners' contention, the Fifth Circuit's decision is also consistent with the decisions in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992)(en banc), *pet. for cert. filed*, No. 92-816 (U.S. Nov. 9, 1992), and *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *pet. for cert. filed*, No. 92-1000 (U.S. Dec. 11, 1992). In those cases, neither of which involved sexual abuse by a teacher or other public employee, the courts held that school officials had no duty to protect students from injuries caused by private actors. *D.R. by L.R.*, 972 F.2d at 1374-76; *Maldonado*, 975 F.2d at 731.[9] Both courts distinguished their cases from the kind of situation present in this case and in *Stoneking II* and

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[9] Similarly, the district court decisions cited by petitioners as rejecting the Fifth Circuit position have involved misconduct by classmates and not by a state actor. *See Dorothy J. v. Little Rock School District*, 794 F.2d 1405, 1409 (E.D. Ark. 1992); *Elliott v. New Miami Board of Education*, 799 F. Supp. 818 (S.D. Oh. 1992); *Russell by Russell v. Fannin County School District*, 784 F. Supp. 1576 (N.D. Ga. 1992). *Cf. Doe v. Douglas County School District*, 770 F. Supp. 591 (D. Colo. 1991)(refusing to hold school district liable under duty to protect child from sexual abuse by psychologist but recognizing possible liability under a deliberate indifference standard).

recognized that school officials may be held liable for their deliberate indifference to sexual abuse committed by a subordinate. *D.R. by L.R.*, 972 F.2d at 1376; *Maldonado*, 975 F.2d at 730-31. Therefore, although the Fifth Circuit may have characterized a school official's obligations in terms of a duty to protect schoolchildren, it is in agreement with the Third, Eighth and Tenth Circuits on the predicates for holding those officials responsible for the sexual abuse of children under their care.[10]

In reality, the breadth of the court of appeals' language, of which petitioners complain, has no practical effect at all. The court adopted a well-established standard for determining petitioners' liability. The court's characterization of petitioners' responsibilities in terms of a duty to protect schoolchildren imposes no greater obligation on them than they would otherwise have as supervisors, nor does it make respondent's burden of proof any less onerous. Petitioners claim that they will have to "reckon with" the affirmative duty to protect at trial (Pet. 16, n.9), but they fail to state how the proof required of respondent is in any way diminished because of the analysis used by the court of appeals. Petitioners also claim that the court of appeals' decision has "opened a 'Pandora's box' of tort liability for school officials" (Pet. 18), but the court of appeals expressly restricted its decision to "constitutional wrongs, not tort principles" and utilized the *Jane Doe "A"* elements to "screen the lesser invasions from those of constitutional dimension." Pet. App. A-21-A-22. Therefore there is no

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10 Petitioners also allege that there is a conflict with the Seventh Circuit's decision in *J.O. v. Alton Community School District 11*, but that decision merely held that school officials could not be held responsible for failure to prevent child abuse simply by virtue of their special relationship with schoolchildren. 909 F.2d at 272. The court of appeals in this case agreed with that principle and required evidence that petitioners were deliberately indifferent to respondent's right not to be abused. The Seventh Circuit intimated that it too would accept such a standard. 909 F.2d at 273. *See also Volk v. Coler*, 845 F.2d at 1431.

reason for this Court to review the Fifth Circuit's dicta regarding the duty to protect, particularly since petitioners must stand trial in any event based on evidence of their failure to discipline their subordinate, Stroud, despite knowledge of his sexual misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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